Bespile Sdn Bhd (in liquidation) v Asianshine Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D5–22–1639 OF 2002
MAH WENG KWAI JC
18 FEBRUARY 2010

Evidence — Adverse inference — Failure of third defendant to testify on own behalf — Effect of — Whether defendant bound by terms of continuing guarantee — Whether adverse inference ought to be drawn against third defendant — Evidence Act 1950 s 114(g)

Evidence — Documentary evidence — Certificate — Facts based on bank statements — Failure to tender certificate under s 90(A)(2) of the Evidence Act 1950 — Whether court could take judicial notice of bank statements generated by computers

The plaintiff claimed from the first defendant, the principal debtor, and from the second and third defendants as the guarantors, the balance amount due for goods sold and delivered to the first defendant. However, the first defendant denied liability but stated that if the goods were delivered, it did not meet the specifications required and were of unmerchantable quality. The first defendant also stated that it did not receive any invoice and alleged that all the sum claimed by the plaintiff had been fully paid to the plaintiff. The second and third defendants denied that they signed any letter of guarantee but only signed the credit application form. The plaintiff went into voluntary liquidation and authorised a qualified accountant ('PW1') to represent the liquidator in the court. PW1 relied on the records and documents of the plaintiff in respect of the transactions with the defendants in his submission in court. The defendants challenged the accountant's submission as he did not have personal knowledge of the records and the documents. The plaintiff relied on, inter alia, four main documents ('the main documents') namely; (i) delivery orders, invoices and statements of accounts; (ii) the credit application forms; (iii) the plaintiff's letter approving the credit facilities; and (iv) the continuing guarantee. The defendants argued on the issue of admissibility of the main documents on the ground that the maker of the documents were not called as witness by the plaintiff and the plaintiff failed to comply with the provision of s 73A(1) and s 32(1) of the Evidence Act 1950 ('the Act') respectively. The plaintiff did not provide further information to the court in respect of its efforts to locate the makers of the documents. However, the plaintiff submitted that it would not be practical to secure the makers of the main documents without much delay or expense. The plaintiff argued that

A the court ought to exercise its discretion in favour of admitting the main documents. The defendants referred to its two bank statements and argued that the entries in the statement of accounts (exh P7) in the main documents in respect to certain payments made to the plaintiff were incorrect. The plaintiff objected to the admissibility of the two bank statements on the B ground that no certificate was tendered to the court pursuant to s 90A(2) of the Act.

Held, allowing the application with costs:

C (1) Although PW1 had no personal knowledge of the transactions and the contemporaneous documents at the material time, PW1 was competent to give evidence on behalf of the plaintiff based on the records and documents which were in the care, custody and possession of the liquidator (see para 8).

D (2) The plaintiff had omitted and/or failed to lay the ground work to enable the court to invoke the provisions of the proviso to s 73(A)(1) of the Act. Statements which are in essence evidence, made by the plaintiff from the bar table cannot be accepted by the court in lieu of E written or oral evidence or witnesses who need to be called (see para 13).

(3) It was never alleged by the defence that the documents were either false documents or forgeries, hence, those documents do become part of the plaintiff's evidence as it have been read and referred to by both parties. F The fact the first defendant had from time to time made partial payments for the goods supplied without any qualification, the first defendant is estopped from contending that they did not receive all the goods or that some of them were of unmerchantable quality (see paras 15–16).

G (4) The two bank statements were clearly generated and produced by computers in the ordinary course of business of the respective banks. Thus, the court could take judicial notice under s 57 of the Act of the fact that bank statements in this era of computers and information H technology are invariably produced by computers. The certificate provided for in s 90A(2) of the Act need not be tendered (see paras 23 & 25).

(5) The denial by the second defendant that he was not bound by the terms of the continuing guarantee and credit application was a bare denial and I could not be accepted. The second defendant knew what he was signing and that he was bound by the terms of the continuing guarantee. The third defendant was deemed to know what he was signing and that he was similarly bound by the terms of the continuing guarantee. The second defendant gave evidence on his behalf and not on behalf of the

third defendant as well. Accordingly, an adverse inference under s 114(g) of the Act was invoked against the third defendant for his absence during trial (see paras 38 & 44).

(6) A credit limit was only a guide applicable to the parties in the business dealings. The first defendant had ordered and been supplied with the goods. The second and the third defendants being not mere guarantors but as principal debtors for all the outstanding sums due and owing by the first defendant to the plaintiff would be held liable for the full sum even it was in excess of the credit limit. The second and third defendants knew or ought to have known the volume of business being transacted between the plaintiff and the first defendant from the purchase orders, delivery orders and invoices issued (see paras 44 & 46); *Dolomite Readymixed Concrete Sdn Bhd v Macronamic Sdn Bhd* [2008] 1 LNS 853 referred.

[Bahasa Malaysia summary

Plaintif menuntut daripada defendan pertama, penghutang utama, dan daripada defendan kedua dan ketiga sebagai penjamin-penjamin, baki jumlah yang terakru barangan yang telah dijual dan diserahkan kepada defendan pertama. Walau bagaimanapun, defendan pertama menafikan liabiliti tetapi menyatakan bahawa jika barangan tersebut dihantar, barangan itu tidak memenuhi spesifikasi yang dikehendaki dan kualitinya tidak boleh dagang. Defendan pertama juga menyatakan bahawa ia tidak menerima sebarang invois dan mendakwa bahawa kesemua jumlah yang dituntut oleh plaintif telahpun dibayar sepenuhnya kepada plaintif. Defendan kedua dan ketiga menafikan mereka telah menandatangani apa-apa surat jaminan tetapi hanya menandatangani borang permohonan kredit. Plaintif digulungkan secara sukarela dan memberi kuasa kepada akauntan bertauliah ('PW1') untuk mewakili likuidator di mahkamah. PW1 merujuk kepada rekod-rekod dan dokumen-dokumen plaintif berkaitan urusniaga-urusniaga dengan defendan-defendan dalam hujahannya di mahkamah. Defendan-defendan mempertikaikan hujahan akauntan kerana dia tidak mempunyai pengetahuan peribadi ke atas rekod-rekod dan dokumen-dokumen tersebut. Plaintif merujuk kepada, antara lain, empat dokumen utama ('dokumen-dokumen utama') iaitu: (i) pesanan-pesanan penghantaran, invois-invois dan penyataan-penyataan akaun; (ii) borang permohonan kredit; (iii) surat palintif tentang kebenaran terhadap kemudahan kewangan; dan (iv) jaminan-jaminan yang berterusan itu. Defendan-defendan berhujah atas isu penerimaan masuk dokumen-dokumen utama tersebut atas dasar bahawa pembuat dokumen-dokumen itu tidak dipanggil sebagai saksi oleh plaintif dan plaintif gagal mematuhi peruntukan s 72A(1) dan s 32(1) Akta Keterangan 1950 ('Akta'). Plaintif tidak memberikan maklumat lanjut kepada mahkamah berkaitan usahanya mencari pembuat dokumen-dokumen tersebut. Walau bagaimanapun, plaintif berhujah bahawa adalah tidak

praktikal untuk mencari pembuat dokumen-dokumen tersebut tanpa memakan masa yang lama dan juga wang yang banyak. Plaintif berhujah bahawa mahkamah harus melaksanakan budi bicaranya untuk memasukkan dokumen-dokumen utama tersebut. Defendan-defendan merujuk kepada dua penyataan akaunnya dan berhujah bahawa catitan dalam penyata-penyata akaunnya (eksh P7) dalam dokumen-dokumen utama berkaitan beberapa pembayaran dibuat kepada plaintif adalah silap. Plaintif membantah penerimaan masuk kedua-dua penyataan bank tersebut atas alasan bahawa tiada sijil yang dikemukakan ke mahkamah berikutan s 90A(2) Akta.

Diputuskan, membenarkan permohonan dengan kos:

(1) Walaupun PW1 tiada pengetahuan peribadi tentang urusniaga-urusniaga tersebut dan dokumen-dokumen pada masa yang berkaitan, PW1 adalah kompeten untuk memberi keterangan bagi pihak plaintif berdasarkan rekod-rekod dan dokumen-dokumen yang dalam simpanan, kawalan dan milikan likuidator (lihat perenggan 8).

(2) Plaintif tidak dan/atau gagal menjalankan persediaan asas bagi membolehkan mahkamah menggunapakai peruntukan proviso s 73(A)(1) Akta. Pernyataan-pernyataan yang dalam inti patinya ialah keterangan, yang dibuat oleh plaintif tidak boleh diterima oleh mahkamah sebagai ganti keterangan bertulis atau lisan atau saksi-saksi yang perlu dipanggil (lihat perenggan 13).

(3) Pembelaan tidak pernah menyatakan bahawa dokumen-dokumen tersebut palsu, maka, dokumen-dokumen tersebut menjadi sebahagian keterangan plaintif kerana diteliti dan dirujuk oleh kedua-dua pihak. Fakta bahawa defendan pertama dari masa ke semasa telah membuat pembayaran separuh-separuh bagi barangan yang dibekalkan tanpa apa-apa syarat, defendan pertama diestop daripada menyatakan bahawa mereka tidak menerima semua barangan tersebut atau sebahagiannya dalam kualiti tak boleh dagang (lihat perenggan 15–16).

(4) Kedua-dua penyataan bank tersebut dicetak dan dikeluarkan oleh komputer dalam urusan perniagaan biasa bank-bank tersebut. Oleh itu, mahkamah boleh melaksanakan notis kehakiman di bawah s 57 Akta tentang fakta penyataan-penyataan bank dalam era teknologi komputer dan informasi kini selalunya dikeluarkan oleh komputer. Sijil yang diperuntukkan di bawah s 90A(2) Akta tidak perlu dikemukakan (lihat perenggan 23 & 25).

(5) Penyangkalan oleh defendan kedua bahawa dia tidak terikat dengan terma-terma jaminan lanjutan dan permohonan kredit tersebut adalah penafian semata-mata dan tidak boleh diterima. Defendan kedua sedia maklum tentang apa yang ditandatanganinya dan bahawa dia terikat

dengan terma-terma jaminan lanjutan. Defendan ketiga dianggap mengetahui apa yang ditandatanganinya dan dia juga terikat dengan terma-terma jaminan lanjutan. Defendan kedua memberi keterangan bagi pihaknya dan bukannya bagi pihak defendan ketiga. Justeru, inferens yang menentang di bawah s 114(g) Akta digunapakai terhadap defendan ketiga kerana ketidakhadirannya semasa bicara (lihat perenggan 38 & 44).

(6) Had kredit hanyalah satu panduan tergunapakai kepada pihak-pihak dalam urusniaga perniagaan. Defendan pertama telah memesan dan dibekalkan dengan barangan tersebut. Defendan-defendan kedua dan ketiga yang bukan hanya penjamin tetapi juga penghutang utama kesemua jumlah yang terakru dan terhutang oleh defendan pertama kepada plaintif akan bertanggungan bagi jumlah penuh walaupun melebihi had kredit. Defendan kedua dan ketiga tahu atau harus tahu jumlah perniagaan yang diurusniagakan antara plaintif dan defendan pertama daripada pesanan-pesanan belian, pesanan-pesanan penghantaran dan invois-invois yang dikeluarkan (lihat perenggan 44 & 46); *Dolomite Readymixed Concrete Sdn Bhd v Macronamic Sdn Bhd* [2008] 1 LNS 853 dirujuk.]

Notes

For cases on adverse inference in general, see 7 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 145–269.

For cases on certificate for production of documentary evidence, see 7 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1239–1242.

Cases referred to

Dolomite Readymixed Concrete Sdn Bhd v Macronamic Sdn Bhd [2008] 1 LNS 614, HC (refd)

Gnanasegaran a/l Pararajasingam v PP [1997] 3 MLJ 1; [1997] 4 CLJ 6, CA (refd)

Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693; [1997] 4 CLJ 509, SC (refd)

KF Trading (Sabah) Sdn Bhd & 2 Ors v Harisson Trading [2008] 1 LNS 853, HC (refd)

KPM Khidmat Sdn Bhd v Tey Kim Suie [1994] 2 MLJ 627, SC (refd)

Kubota Agricultural Machinery v Sharizan Agricultural Machinery Sdn Bhd [2001] 6 CLJ 104, HC (refd)

Malayan Banking Bhd v Marilyn Ho Siok Lin [2006] 7 MLJ 249, HC (refd)

Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong [1996] 3 MLJ 85; [1996] 3 AMR 2869, CA (refd)

PP v Ong Cheng Heong [1998] 6 MLJ 678; [1998] 4 CLJ 209, HC (distd)

Sounders v Anglia Building Society (an appeal from Gallie v Lee) [1971] AC 1004, HL (refd)

Legislation referred to

Evidence Act 1950 ss 32(1), 57, 73(1), 73(A)(1), proviso, (2), (5), 90A(1), (2), (6), 114(g)

Wong Mun Hoe (Carol Tiong with him) (Cheang & Ariff) for the plaintiff. Lawrence BT Tan (Moi, NK Koh & Chee) for the defendants.

Mah Keng Wai JC:

[1] The plaintiff claims the sum of RM397,327 from the first defendant as the principal debtor and from the second and third defendants as the guarantors (and principal debtors) being the balance amount due and owing for goods (construction piles) sold and delivered to the first defendant.

[2] The first defendant denies liability and in para 6 of the defence avers that the goods ordered were not received. However, in para 7 of the defence, the first defendant avers that if the goods were delivered, they did not meet with the specifications and were of unmerchantable quality. The first defendant also avers that they did not receive the invoices or alternatively, all sums claimed have been fully paid to the plaintiff.

[3] The second and third defendants in their defence deny that they have signed the letter of guarantee of 30 July 1997. In evidence, the second defendant stated he was not given a complete set of the said letter of guarantee and he together with the third defendant only signed on the credit application form.

[4] The plaintiff went into voluntary liquidation on 22 December 2000 and one Dato Tan Kim Leong was appointed the liquidator. Yap Chin Keat ('PW1') was called by the plaintiff as its only witness. PW1, a qualified accountant, informed the court that he is a Director-Advisory of BDO Consulting Sdn Bhd, a firm of accountants, and that he is authorised to represent the liquidator in court.

[5] PW1 testified that he had access to the documents and records of the plaintiff in respect of the transactions with the defendants which took place between 1994 and 1998. When challenged by defence counsel in cross-examination, PW1 admitted that he did not have personal knowledge of the several transactions and the documents, but stated that he was nonetheless able to give evidence in court based on the records and documents held in his possession.

[6] PW1 also admitted that he had only been instructed orally by the liquidator to give evidence in court on behalf of the plaintiff and that he did not have any letter of authorisation with him.

[7] In my view I find that PW1 is a competent witness to give evidence on behalf of the plaintiff on the instructions of the liquidator. Defence counsel has not been able to point to any legal requirement for the need of written authority, and neither am I aware of such a requirement, before PW1 can give evidence on behalf by the plaintiff on the instructions of the liquidator. Further, I hold that there is no requirement for the liquidator to give evidence personally on behalf of the plaintiff. There is no reason to doubt that PW1 was authorised to do so within the scope of his duties and that he was not just being a busy body acting on a frolic of his own in the affairs of the plaintiff without authorisation.

[8] I also hold that while PW1, who was appointed as a Director-Advisory of BDO Consulting Sdn Bhd in September 2007, has no personal knowledge of the transactions and the contemporaneous documents at the material time, PW1 is competent to give evidence on behalf of the plaintiff based on the records and documents presently in the care, custody and possession of the liquidator. In the cited case of *Kubota Agricultural Machinery v Sharizan Agricultural Machinery Sdn Bhd* [2001] 6 CLJ 104 Ramli Ali JC (as he then was) held that although the plaintiff's witness had no personal knowledge of the events that took place before her employment, her evidence was based on relevant documents in the possession of the plaintiff company and was thus admissible.

[9] To prove its case the plaintiff relied on, inter alia, four main documents (the main documents) namely:

(a) delivery orders, invoices and statements of accounts found in *ikatan dokumen plaintif* ('IDP') Part C at pp 21–126, marked as P1;

(b) the credit application forms found in IDP Part C at pp 1–3, marked as P2;

(c) the plaintiff's letter dated 23 December 1994 approving the credit facilities found in IDP Part C at pp 4 and 5, marked as P3; and

(d) the continuing guarantee found in IDP Part C at pp 7–12, marked as P4.

[10] Serious objection was raised by defence counsel on the admissibility of the main documents on the ground that the maker/s of the documents

was/were not called as witnesses by the plaintiff and that the plaintiff had failed to comply with the provisions of s 73A(1) and s 32(1) of the Evidence Act 1950 respectively.

[11] Plaintiff's counsel submitted that the court ought to exercise its discretion in favour of admitting the main documents as exhibits under the proviso to s 73A(1) which reads:

> Notwithstanding anything contained in this Chapter, in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied:
>
> (a) if the maker of the statement either —
>
> (i) had personal knowledge of the matters dealt with by the statement; or
>
> (ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have had, personal knowledge of those matters; and
>
> (b) if the maker of the statement is called as a witness in the proceedings:
>
> Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

[12] Plaintiff's counsel pointed out that as the plaintiff had been wound up for about ten years, the makers of the documents were not available having left the company since then and that it would not be practical to secure their attendance without an amount of delay or expense. Plaintiff's counsel further informed the court that efforts had been made to locate the relevant officers and in fact a subpoena had been served on one Encik Mohd Yusof. However when Encik Mohd Yusof turned up in court he had informed plaintiff's counsel that he had no personal knowledge of the transactions and documents and accordingly plaintiff's counsel applied to the court to release Encik Mohd Yusof from his subpoena.

[13] Unfortunately, all that was said about the unavailability of material witnesses was said by plaintiff's counsel from the bar table. It is regrettable that plaintiff's counsel did not see it fit to adduce such evidence from PW1 or from the person/s who made the efforts to locate the material witnesses but

had failed. Accordingly, I agree with defence counsel that plaintiff's counsel has omitted and/or failed to lay the ground work to enable the court to invoke the provisions of the proviso to s 73(A)(1) of the Evidence Act. Statements which are in essence evidence, made by plaintiff's counsel from the bar table cannot be accepted by the court in lieu of written or oral evidence of witnesses who need to be called.

[14] However, that is not the end of the matter with regards to the admissibility of the main documents. The court while being mindful of the rule against hearsay can in exercise of its discretion rely on the provisions of s 73A(5) which states:

> For the purpose of deciding whether or not a statement is admissible as evidence by virtue of subsections (1) to (4), *the court may draw any reasonable inference from the form or contents of the document in which the statement is contained*, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a registered medical practitioner, and, where the proceedings are with assessors, the court may in its discretion reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason, it appears to it to be [inexpedient] in the interests of justice that the statement should be admitted.

read with s 73A(2) which states:

> In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence —
>
> (a) notwithstanding that the maker of the statement is available but is not called as a witness; and
>
> (b) notwithstanding that the original document is not produced, if, in lieu thereof, there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be.

and admit the main documents as exh 'P'. This is so as the court can draw a reasonable inference from the form or contents of the documents in which the statements are contained and from other circumstances of the case. In this case the plaintiff company had been wound up ten years ago and the documents and records are in the care, custody and possession of the liquidator. Although the main documents are in Bahagian C of the *ikatan dokumen plaintif* ('IDP') where both the authenticity and contents of the documents are disputed by the defendants, it cannot be denied by the defendants that the documents are documents between the plaintiff and the defendants only and are not third party documents. All the main documents pertain to the sale and purchase of the piles during the period of 1994–1998

between the plaintiff and the defendants. This is a case where it will not be reasonably practicable to secure the attendance of the maker/s of the documents without undue delay or expense.

[15] Notwithstanding that the main documents are in Bahagian C of *ikatan dokumen plaintif* and defence counsel had objected to the authenticity and contents of the documents, both counsel had referred to these documents in evidence and defence counsel in particular had cross-examined PW1 in extenso and had sought DW1's explanation on them in his evidence during the trial. It was never alleged by the defence that the documents were either false documents or forgeries. That being the case I hold that these documents do become part of the plaintiff's evidence as they have been read and referred to by both parties. In the case of *Jaafar bin Shaari (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 at p 706; [1997] 4 CLJ 509 at p 521, Peh Swee Chin FCJ held that:

> … where the truth of contents of any of the documents in the agreed bundle of documents is not admitted and challenged in court, such documents therein do not form automatically a part of the evidence of the case in question ipso facto, but any of such documents does become part of such evidence if it is read or referred to by either of the parties, wholly of partly, at length or in a briefest of mention, either in examination of any witness, in submission at any stage or even on any unilateral drawing of court's attention to it by either of the parties at any time before conclusion of the case.

[16] Having admitted the main documents in evidence, the issue to be decided by the court is whether the defendants have fully settled their debt or whether a balance sum remains outstanding. Although the first defendant in its defence had pleaded that not all the goods were received or alternatively that the goods did not meet with the specifications, were not suitable to be used and were not of merchantable quality, no evidence whatsoever was adduced by the first defendant to support these contentions. On the contrary, the fact that the first defendant had from time to time made partial payments for the goods supplied without any qualification, the first defendant is estopped from contending that they did not receive all of the goods or that some of them were of unmerchantable quality.

[17] In para 5 of the statement of claim, the plaintiff vide 26 invoices issued from 18 July 1997 to 20 March 1998, claims for the sum of RM397,327 that is, the total sum of RM459,564.60 less payments of RM62,237.60. The statement of accounts can be seen in IDP at p 134, marked as exh P7.

[18] The first defendant denies having received the invoices and strongly disputes the amounts paid as recorded by the plaintiff. Defence counsel referred DW1, Teh Teng Chong (the second defendant and who was called as the only witness for the defence) to p 3 of the *ikatan dokumen defendan* ('IDD') marked as exh D8. Exhibit D8 is a payment voucher dated 12 December 1997 issued by the first defendant to the plaintiff. Payment was by OCBC cheque No 960356 for the sum of RM230,616.79 which was acknowledged as received by one Kelvin, the sales manager of the plaintiff at the bottom right of the payment voucher. Defence counsel also referred DW1 to p 4 of IDD, marked as exh D9. Exhibit D9 is a payment voucher dated 24 January 1998 issued by the first defendant to the plaintiff. Payment was by SBB cheque No 169278 for the sum of RM70,000.

[19] PW1 in his evidence on the two cheques was referred to exh P7 at p 134 of IDP. Therein it is clearly shown that the payment vide OCBC cheque No 960356 was for the sum of RM11,091.10 only and not for RM230,616.79 as shown in exh D8. Similarly in exh P7 the payment vide SBB cheque No 169278 was for the sum of RM41,146.50 only and not for RM70,000 as shown in exh D9.

[20] DW1 in his evidence maintained that the entries in the statement of account (exh P7) an internal document prepared by the plaintiff in so far as the said two cheques were concerned are wholly incorrect. To prove his point DW1 referred to the first defendant's bank statement received from OCBC Bank dated 31 December 1997 and from Southern Bank Bhd for the period from 1 January 1998 to 23 February 1998, where it is clearly shown in the OCBC statement that cheque No 960356 was cleared on 16 December 1997 for the sum of RM230,616.79 and in the SBB statement that cheque No 169278 was cleared on 3 February 1998 for the sum of RM70,000. The cheque numbers and the amounts clearly tally with the particulars in exhs D8 and D9 respectively and are inconsistent with the particulars stated in exh P7.

[21] Plaintiff's counsel objected to the admissibility of the two bank statements on the ground that no certificate was tendered to court pursuant to s 90A(2) of the Evidence Act which provides:

> For the purposes of this section it *may* be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.

[22] In support of his objection plaintiff's counsel referred to the case of *Public Prosecutor v Ong Cheng Heong* [1998] 6 MLJ 678; [1998] 4 CLJ 209 where at p 229, Vincent Ng J (as he then was) held that two computer printouts were inadmissible in evidence as the witness who tendered the printouts introduced himself as 'a supervisor of the registration department of vehicles and did not claim any responsibility for the conduct of the activities for which the relevant computer was used'. No certificate pursuant to s 90A(2) was tendered to court.

[23] With respect, I think the decision of Vincent Ng J (as he then was) on the operation of s 90A(2) of the Evidence Act can be distinguished. Where it is sought to prove that a document was produced by the computer in the course of its ordinary use, a certificate signed by a person who either before or after the production of the document by the computer was responsible for the management of the operation of that computer, would be necessary. However, in cases where the documents in issue such as the two bank statements in this case, are clearly generated and produced by computers in the ordinary course of business of the respective banks, I see no valid reason why the court cannot take cognisance, indeed judicial notice under s 57 of the Evidence Act, of the fact that bank statements in this era of computers and information technology are invariably produced by computers.

[24] Further by s 90A(6) it is provided that a document produced by a computer shall be admissible in evidence and any document so produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use.

[25] Upon such a finding, the certificate provided for in s 90A(2) need not be tendered. It is only in cases where it is uncertain whether a document was produced by a computer in the course of its ordinary use would a certificate under s 90A(2) be necessary. In any event the word 'may' as opposed to the word 'must' is used in s 90A(2). The word 'may' implies that it is a 'mere direction or discretion' under s 90A(2) in the manner a document produced by a computer may be proved in court.

[26] In the case of *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85; [1996] 3 AMR 2869 it was held by the Court of Appeal that the word 'must' instead of 'may' in O 32 r 13(2)(b) of the Rules of the High Court 1980 implies it is a peremptory mandate, not a mere direction or discretion. The word 'must' must be equated to 'shall' which means that the court does not have a discretion.

[27] Shaik Daud Ismail JCA in the case of *Gnanasegaran a/l Pararajasingam v Public Prosecutor* [1997] 3 MLJ 1; [1997] 4 CLJ 6 held that:

(2a) Sub-s (1) of s 90A allows the production of computer generated documents or statements if there is evidence, firstly, that they were produced by a computer, and secondly, that the computer produced them in the course of its ordinary business. However, once the prosecution adduce evidence through a bank officer that the document is produced by a computer, it is not incumbent upon them to also produce a certificate under sub-s (2), as sub-s (6) provides that a document produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use.

[28] The learned judge went on to say that once the court accepted the statement of accounts were computer printouts the first part of sub-s (1) has been proved and it would be superfluous for a certificate under sub-s (2) to be issued, and in view of the deeming provision of sub-s (6) the second part is also proved.

[29] In the same case Mahadev Shanker JCA held that

(1) Section 90A was enacted to bring the 'best evidence rule' up to date with the realities of the electronic age. The effect of s 90A(1) in the present scenario is that it is no longer necessary to call the actual teller or bank clerk who keyed in the data to come to court provided he did so in the course of the ordinary use of the computer.

[30] Further in consideration of the reasoning of Peh Swee Chin FCJ in the *Jaafar bin Shaari*'s case I accordingly overruled the objection raised by plaintiff's counsel and directed that the bank statement issued by OCBC be marked as exh D11 and the bank statement issued by SBB be marked as exh D10. The OCBC bank statement was admitted and marked as exh D11 notwithstanding the protestation by plaintiff's counsel that the document was tendered at the eleventh hour thereby catching the plaintiff by surprise and causing prejudice and embarrassment. Although it was not salutary for the defendants to produce exh D11 on the day of the trial itself, the delay was explained by defence counsel that the document was recovered only a day or two before the trial commenced. In any event I hold that no real prejudice or injustice has been occasioned to the plaintiff. The entry in the OCBC bank statement is clear and there are no grounds to doubt its authenticity and veracity. According to PW1, the only way to cross check the impugned entry in exh D11 would be to obtain the cheque leaf in question from the bank to determine the cheque number, the amount payable and the name of the drawee. However as the OCBC bank statement was issued some 13 years ago it may be practically impossible to obtain the cheque leaf from the bank considering that banks do not keep a record of the cheque leaves for more than seven years.

[31] Further, although it was suggested by the plaintiff that the drawee of the said two cheques may not have been in the name of the plaintiff, no evidence whatsoever was adduced in support of this suggestion. On the contrary the name of the payee appearing in exhs D10 and D11 is clearly that of the plaintiff.

[32] In the final analysis, I accept the relevant entries in exhs D10 and D11 as correct and reject the relevant entries in exh P7, which is an internal document prepared by the plaintiff, as being inaccurate. In the case of *KPM Khidmat Sdn Bhd v Tey Kim Suie* [1994] 2 MLJ 627, the then Supreme Court held 'it was wrong in law to rely on a summary of accounts prepared by Ah Lian who was not called as a witness nor made available to the defendant. Moreover the record book of the respondent, which was the source document upon which the summary of accounts was prepared, was never produced and the respondent had not been called to explain the facts and the basis of the calculation of the amount claimed'. Similarly in this case, no evidence was adduced by the plaintiff to show who had prepared exh P7 and the maker was not called as a witness. The accounts file/book or any other record book which was the source document upon which exh P7 was prepared was never produced in court.

[33] On going through the figures with PW1 as shown in pp 78–81 of the notes of evidence (transcribed from the court recording transcript (CRT) system) I find that the first defendant is indebted to the plaintiff in the sum of RM148,947.81 only, made up as follows:

> Total invoiced sum of RM429,564.60 minus payments of RM10,000 (vide SBB Cheque No 219557), RM70,000 (and not RM41,146.50, vide SBB Cheque No 169278) and RM230,616.79 (and not RM11,091.10, vide OCBC Cheque No 960356).

[34] The purported payments of RM41,146.50 and RM11,091.10 in the above calculation have to be disregarded otherwise it will result in double counting in favour of the defendants.

[35] The defence by the first defendant that they had fully paid all sums due and owing to the plaintiff cannot therefore be accepted.

[36] The next main issue to be determined by the court is whether the second and third defendants are liable to indemnify the plaintiff by reason of the continuing guarantee found in IDP, Part C at pp 7–14, produced and marked as exh P4. It is quite clear that the first defendant had applied to the

plaintiff for a monthly credit facility of RM200,000 on 19 December 1994 as evidenced by exh P2 (IDP, Part C, pp 1 and 2). The application for the credit facility was approved by the plaintiff on 23 December 1994 with a credit limit of RM100,000 and with the facility being guaranteed by the second and third defendants. The letter of approval is marked as exh P3 (IDP, Part C pp 4 and 5).

[37] Although the continuing guarantee (P4) itself is not dated, it does bear the stamp duty office date stamp of 30 July 1997. The names and addresses of the second and third defendants as guarantors are hand written in p 11 of IDP, Part C and the signatures of the second and third defendants appear on p 12 of IDP Part C. While it is pleaded in the defence that the second and third defendants did not sign the continuing guarantee, yet DW1 in his evidence rather inexplicably claims that he had only received the last page of P4 being the signature page (IDP, Part C p 12) and not all the pages of exh P4 from the plaintiff.

[38] In evidence DW1 admitted that the handwritten names in the left column of the last page of exh P4 were written by him. Pursuant to s 73(1) of the Evidence Act which provides:

> In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the court to have been written or made by that person, may be compared by a witness or by the court with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

a comparison can be made by the court of the handwriting and signatures appearing on p 2 of exh P2 with the handwriting and signatures appearing on p 6 of exh P4 (IDP, Part C p 12). A comparison of the handwriting on p 5 of exh P4 (IDP, Part C p 11) can also be made with the handwriting on p 6 of exh P4. Upon the comparisons made, I find that it is quite conclusively proven that DW1 had in fact written the particulars on p 2 of exh P2 and on pp 5 and 6 of exh P4 and together with D3 had signed on p 2 of exh P2 and on p 6 of exh P4. It is quite obvious that the denial by the second defendant that he is not bound by the terms of exh P2 and exh P4 is a bare denial and cannot be accepted.

[39] If indeed DW1's evidence that he did not sign the continuing guarantee on p 6 of P4 (IDP, Part C p 12) is true and ought to be accepted then the impugned signature must be treated as a forged signature. However DW1 did absolutely nothing to show that the signature is a forgery. He did

not lodge any police report to complain about the falsity nor did he obtain any opinion from a handwriting expert to prove that the signature is not his. I have no hesitation in rejecting DW1's evidence on this allegation.

[40] DW1 by claiming that he did not receive all the pages in exh P2 and exh P4 suggests that he did not know what he was signing. In the House of Lords case of *Sounders v Anglia Building Society (an appeal from Gallie v Lee)* [1971] AC 1004, Lord Reid held that the plea of non est factum cannot be available to anyone who was content to sign without taking the trouble to try to find out the general effect of the document and that it is for the person who seeks the remedy to show that he should have it.

[41] Further in the case of *Malayan Banking Bhd v Marilyn Ho Siok Lin* [2006] 7 MLJ 249 David Wong J alluded to the legal principle of the plea of non est factum as aptly summarised by Visu Sinnadurai J in his book the *Law of Contract* (3rd Ed) at p 319 as follows:

> The law on non est factum was reviewed and restated by the House of Lords in *Sounders v Anglia Building Society (Gallie v Lee)*. The House of Lords spelt out the following principles of law governing the plea of non est factum:
>
> (a) The plea of non est factum can only rarely be established by a person of full capacity and although it is not confined to the blind and illiterate, any extension of the scope of the plea would be kept within narrow limits. In particular, it is unlikely that the plea would be available to a person who signed a document without informing himself of its meaning.
>
> (b) The burden of establishing a plea of non est factum falls on that party seeking to disown the document and that party must show that in signing the document he acted with reasonable care. Carelessness (or negligence devoid of any special, technical meaning) on the part of the person signing the document would preclude him from later pleading non est factum on the principle that no man may take advantage of his own wrong; It is not, however, an instance of negligence by way of estoppel.
>
> (c) In relation to the extent and nature of the difference between the document as it is and the document as it was believed to be, the distinction formerly drawn between the character and the contents of the document is unsatisfactory and it is essential, if the plea is to be successful, to show that there is a radical or fundamental distinction.

[42] In light of the circumstances of this case and the cited authorities I hold that the second defendant knew what he was signing and that he is bound by the terms of the continuing guarantee. Likewise, the third defendant who was absent during the trial and did not give evidence on his own behalf, is deemed to know what he was signing and that he is similarly bound by the terms of the continuing guarantee. Additionally, no explanation whatsoever was forthcoming from the defence to account for the absence of

the third defendant during trial. The second defendant gave evidence on his own behalf only and not on behalf of the third defendant as well. Accordingly, this will be an appropriate case where the adverse inference under s 114(g) of the Evidence Act shall be invoked. Further once a defendant in civil proceedings elects not to call evidence, then all the evidence led by the plaintiff must be assumed to be true.

[43] A further issue that needed to be determined was whether the second and third defendants should only be held liable up to the credit limit of RM100,000 pursuant to the credit facility (exh P3) or whether they should be held liable for the full sum due and payable by the first defendant even if it is in excess of the credit limit.

[44] To begin with, this line of defence was not pleaded by the second and third defendants in their defence. It is trite law that parties are bound by their pleadings. In any event I am of the view that a credit limit is only a 'guide' applicable to the parties in their business dealings, and which may be increased or waived altogether at the option of the grantor of the limit. In this case the first defendant had ordered and been supplied with goods very much in excess of RM100,000. The second and third defendants being not mere guarantors but as principal debtors for all the outstanding sums due and owing by the first defendant to the plaintiff would be held liable for the full sum even if it is in excess of the credit limit.

[45] In the cited case of *KF Trading (Sabah) Sdn Bhd & 2 Ors v Harisson Trading* [2008] 1 LNS 853 it was held by the court, that 'a credit limit is merely a guideline and it could be relaxed when business is good'.

[46] The second and third defendants knew or ought to have known the volume of business being transacted between the plaintiff and the first defendant from the purchase orders, delivery orders and invoices issued.

[47] Further in the case of *Dolomite Readymixed Concrete Sdn Bhd v Macronamic Sdn Bhd* [2008] 1 LNS 614, Kang Hwee Gee J (as he then was) held that as the defendants bound themselves to be liable not merely as a guarantor and indemnor but also as a principal debtor, the argument that they were bound to pay up to the credit limit of RM120,000 in the credit facilities form would not apply.

[48] Accordingly I will allow the plaintiff to enter judgment against all the three defendants for the sum of RM148,947.81 only together with interests at the rate of 8%pa thereon from the date of filing of the writ of summons to the date of full payment and costs of the action.

Application allowed with costs.

Reported by Mashrifah Ravendran